IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 118

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC., POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC.,

Appellants,

v.

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT MCALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

APPELLANTS' REPLY BRIEF

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Although Appellees concede that the facts "as stated in appellants brief are substantially correct" (p. 2), they do not discuss any of the authorities cited by us or attempt to distinguish them from the instant situation, except that they do mention *Roth* v. *United States* and *Bantam Books, Inc.* v. *Melko*.

As to the reference by Appellees to *Roth* v. *United States* that obscene publications are not protected by the First Amendment, of course, we agree and at page 14 of

our main brief, we cited the *Roth* case for that very proposition. But, we submit, that principle merely leads to the doctrine that non-obscene publications do have such protection, and that, therefore, legislation must be carefully scrutinized so that, as stated in *Roth*, "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests" (p. 488).

With respect to *Bantam Books, Inc. v. Melko*, Appellees refer to the fact that "the New Jersey Supreme Court mentioned that the Superior Court found the book there in question not to be obscene" (p. 5). Actually, as the record in that case shows, this was not a finding but a *dictum* by the Superior Court, for the issue there, as here, did not involve the obscenity or non-obscenity of the book. Actually, the book was not even in evidence.

As to Article XII of the Rhode Island Constitution

The issues here presented do not involve Article XII of the Constitution of Rhode Island as asserted by Appellees at page 2 of their brief. We submit, however, that its purposes "The diffusion of knowledge" and securing to the people "the advantages and opportunities of education" are thwarted by Resolution 73, as amended. That Resolution and the activities of the Appellees thereunder, by inhibiting the circulation of books without prior judicial determination that they are obscene, function in direct antithesis to the stated purposes of the Article.

As to the Inference Sought to be Drawn by Appellees

At page 3 of their brief Appellees admit that there has been limitation of circulation of books in Rhode Island since the Resolution went into effect, for they say "The facts contained in the transcript of record and as stated in appellants brief are substantially correct".

However, Appellees ask that "an inference" be drawn that Silverstein's withdrawal of the books from circulation, after receipt of the Commission's notices, was because Silverstein "realized the books were objectionable". This is but another way of stating that Silverstein's withdrawal of the books was "voluntary." The basic difficulty with Appellees' position is that such inference would be contrary to the uncontradicted testimony (p. 11 our main brief and R. 33, A. 44); contrary to the threats of prosecution used by the Commission in its notices to booksellers and the Commission's system of issuing questionnaires to the Police Chiefs to ascertain "if they had followed up any list, if they had met any cooperation, or any negative action." (R. 45, A. 50-51); and contrary to statements at a Commission meeting by Father Flannery, a Commission member, and Mr. McAloon, the Commission's Executive Secretary, referring to "publications as having been *prescribed* by the Commission" (R. 111).

As to Alleged Proof of Obscenity of the Listed Publications

At page 3 of their brief, Appellees make the further statement "that the only evidence in the record of this cause shows the books involved are 'objectionable for sale, distribution or display for youth under 18 years of age'".

There is not a shred of evidence to support this statement. However, we do not dispute, as stated by Appellees, that such "is the declaration or statement in each of the exhibits introduced by the petitioners-appellants in the Superior Court." But such *ex parte* findings by the members of an administrative agency, in most cases by a majority based upon unknown standards, may not be used as a substitute for a court determination made after a trial in accordance with the requirements of due process.

As to the Obscenity or Non-Obscenity of Appellants' Books

At page 5 of their brief, Appellees make the statement "As far as the record shows, to say that the appellants' books are not 'obscene' is gratuitous assertion." We have never attempted to deal with the question of obscenity or non-obscenity of Appellants' books. The issues here involved do not include any such question. The issues, simply stated, are, do the Resolution and the activities of Appellees thereunder, violate freedom of the press by tending to suppress or limit the circulation of books *without prior judicial determination* that they are obscene?

As to Appellees' Claim of Unrestricted License

At page 5 of their brief, Appellees make the further statement "In the current state of the record, the appellants contention amounts to unrestricted license to disseminate obscene as well as non-obscene books."

This same unwarranted accusation was made by Appellees in the Superior Court of Rhode Island. Justice Mackenzie summarily disposed of that argument with the following statement:

"Contrary to the contention of the respondents in their brief, the petitioners here are not seeking an injunction so as to furnish them with 'unlimited license to publish and distribute obscene publications in this State'. The petitioners desire freedom to publish, as guaranteed to them by the above cited sections of the constitutions of the United States and Rhode Island, knowing full well the consequences of their acts if they violate the criminal laws by the publication of obscene books and periodicals." (R. 119-120)

Conclusion

For the reasons set forth in our main brief and in this reply brief, it is urged that

(a) Resolution No. 73 of the Acts and Resolves of 1956 of the Rhode Island General Assembly, as amended by Resolution No. 95 of the Acts and Resolves of 1956, should be declared unconstitutional.

(b) The judgment of the Superior Court of Rhode Island entered on January 18, 1962 should be reversed and Orders Nos. 2 and 3 of the judgment of that Court entered on March 2, 1961 should be reinstated.

Respectfully submitted,

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